MBf Cards Services Sdn Bhd v Chew Ah Too @ Chew Hoe Kee

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-04–94 OF 2004
SURIYADI, ABU SAMAH AND SULONG MATJERAIE JJCA
31 JULY 2008

Civil Procedure — Appeal — Appeal from subordinate court to High Court — Notice of appeal — Whether notice of appeal ought to be filed and served within 14 days from date of decision — Whether service copy of notice ought to be a copy filed in court and properly endorsed — Whether service copy of notice ought to be identifiable copy of notice — Subordinate Court Rules 1980 O 49 rr 2(3), (6)

Civil Procedure — Appeal — Notice of — Appeal from subordinate court to High Court — Whether notice of appeal ought to be filed and served within 14 days from date of decision — Subordinate Court Rules 1980 O 49, rr 2(3), (6)

Civil Procedure — Appeal — Notice of — Failure to include properly endorsed notice of appeal in record of appeal — Effect of

Civil Procedure — Appeal — Notice of — Service of notice of appeal — Appellant unable to file and serve notice of appeal within 14-day statutory period — Whether appellant ought to apply for enlargement of time to serve notice

Civil Procedure — Appeal — Notice of — When appeal considered 'brought' — Whether appeal only brought when notice of appeal filed, endorsed and served

Civil Procedure — Rules of court — Non-compliance — Discretion of court to allow civil litigation notwithstanding non-compliance of procedural rules — How such discretion exercised — Whether ought to be exercised in favour of an appeal brought in breach of procedural rules — Whether to allow such appeal would occasion substantial injustice or result in flouting of strict rules in judicial system

Statutory Interpretation — Construction of statutes — Literal approach — Application of

A The plaintiff (respondent) entered judgment in the sessions' court against the defendant (appellant) under O 22 rr 1 and 3 of the Subordinate Courts Rules 1980 ('the SCR'). The defendant appealed to the High Court. In the High Court, the plaintiff raised a preliminary objection alleging that he had not been served with a properly endorsed notice of appeal as required by B O 49 of the SCR. The notice served upon the plaintiff had not been filed, dated, numbered or sealed. The defendant also failed to subsequently enlarge time to serve a properly endorsed notice of appeal on the plaintiff. The High Court allowed the plaintiff's objection and dismissed the appeal. The defendant appealed to the Court of Appeal.

C

Held, dismissing the appeal with costs:

(1) The cardinal rule of construction of a statute, or rules framed under a D statute, is to read them literally. The words used by the Legislature should be given their ordinary, natural and grammatical meaning, though they should not be construed in such manner as to impute absurdity to the Legislature. The test is to see whether the interpretation is a sound one or not. If the interpretation leads to some injustice or E absurdity, then a need to determine the real and true intention of the Legislature arises. A harmonious construction should be given in order to avoid making one provision of the Act conflict with the other (see para 11); *Subramanya Ayyar v Swaminathan Chettiar* AIR 1928 M 746 referred.

F

(2) Order 49 r 2(6) of the SCR cannot be read in isolation but has to be read together with O 49 r 2(3) of the SCR. These two provisions, read together, imply that the notice served must be the same notice first filed in court and having gone through the various administrative processes. G These provisions do not refer to just any spare or unprocessed notice to be served. Statutorily, the filing and service of the notice must be effected within 14 days from the date the decision is pronounced. Sequentially, the filing of the notice comes first followed by service thereof. The court cannot know whether the notice has been filed and H served within the 14-day period unless a date is shown in the notice. The Legislature thus requires an identifiable notice ie, a notice that has been filed, to be served and not just any notice (see paras 11, 13 & 15); *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419 followed and *Ng Cheah Cheong v Ong Sing Hock* [2002] 6 MLJ 481 not I followed/overruled.

(3) Currently, it is almost impossible for an appellant to extract and serve a notice of appeal within the statutory 14-day period. However, an aggrieved appellant is not stopped from applying for an enlargement of time to serve the endorsed notice of appeal. A simple application

supported by reasonably good grounds would suffice. In the instant case, the defendant (appellant) did nothing (see para 19).

(4) The fact that a copy of the endorsed notice of appeal was not included in the record of appeal meant that the document was not extracted from the court registry. Without an endorsed copy extracted and included in the record of appeal, the Court of Appeal was unable to compare and confirm whether the unendorsed notice was similar to the filed copy. The Court of Appeal would therefore assume that the appellant had abandoned the appeal (see para 20).

(5) Under O 1A of the Rules of the High Court 1980 ('the RHC'), the courts possess some discretion to ensure that a civil litigation is not prevented by mere non-compliance of procedural rules. In order to apply that discretion, there must be some evidence to warrant circumventing the strict rules. In the instant case, the service of the impugned unendorsed notice could not have salvaged the defendant's (appellant's) case as there was no evidence to show that the notice was similar to the one filed. The want of any rectification also did not help the defendant/appellant. To allow an incompetent appeal in the instant case would occasion substantial injustice. Further, if the plaintiff (appellant) here were to be allowed to rely on O 2 r 3 of the RHC, it would result in the flouting of the strict rules in the judicial system and make O 49 of the SCR ineffectual, apart from prejudicing the plaintiff (respondent) (see para 24).

(6) An appeal from the subordinate court is not 'brought' until the notice of appeal is filed, endorsed and the endorsed notice served (see para 25).

[Bahasa Malaysia summary

Plaintif (responden) telah memasuki penghakiman di mahkamah sesyen terhadap defendan (perayu) di bawah A 22 kk 1 dan 3 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Defendan telah merayu ke Mahkamah Tinggi. Di Mahkamah Tinggi, plaintif telah membangkitkan bantahan awal dengan mengatakan bahawa dia tidak diserahkan dengan notis rayuan yang telah diendors sewajarnya seperti yang ditetapkan oleh A 49 KMR. Notis yang diserah ke atas plaintif tidak difailkan, bertarikh, bernombor atau dimeterai. Defendan juga gagal untuk melanjutkan masa selanjutnya bagi menyerahkan notis rayuan yang diendors sewajarnya ke atas plaintif. Mahkamah Tinggi telah membenarkan bantahan plaintif dan menolak rayuan tersebut. Defendan telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Rukun utama pembentukan statut, atau kaedah-kaedah yang dibuat

di bawah statut, perlu dibaca secara harfiah. Perkataan-perkataan yang digunakan oleh badan perundangan patut diberikan maksud biasa, semula jadi dan tatabahasanya, meskipun tidak patut ditafsirkan sebegitu untuk mengatakan badan perundangan tidak munasabah. Ujiannya adalah dengan melihat sama ada tafsiran tersebut munasabah atau tidak. Jika tafsiran tersebut tidak adil atau tidak munasabah, maka keperluan untuk menentukan niat sebenar badan perundangan timbul. Pembentukan yang harmoni patut diberikan bagi tujuan mengelakkan daripada membuat peruntukan Akta yang bercanggah dengan yang lain (lihat perenggan 11); *Subramanya Ayyar v Swaminathan Chettiar* AIR 1928 M 746 dirujuk.

(2) Aturan 49 k 2(6) KMR tidak boleh dibaca secara berasingan tetapi perlu dibaca bersama dengan A 49 k 2(3) KMR. Kedua-dua peruntukan tersebut, jika dibaca bersama, membayangkan bahawa notis yang disampaikan hendaklah merupakan notis sama yang terlebih dahulu telah difailkan di mahkamah dan telah melalui pelbagai proses pentadbiran. Peruntukan tersebut tidak hanya merujuk kepada mana-mana notis lebihan atau notis yang belum diproses yang akan disampaikan. Menurut statut, pemfailan dan penyampaian notis tersebut hendaklah dilaksanakan dalam tempoh 14 hari daripada tarikh keputusan diumumkan. Secara berurutan, notis difailkan dahulu disusuli dengan penyampaiannya. Mahkamah tidak boleh mengetahui sama ada notis tersebut telah difailkan dan disampaikan dalam tempoh 14 hari tersebut kecuali jika terdapat tarikh ditunjukkan dalam notis tersebut. Badan perundangan oleh itu memerlukan notis yang boleh dikenal pasti, iaitu notis yang telah difailkan, yang akan disampaikan dan bukan sebarang notis (lihat perenggan 11, 13 & 15); *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419 diikut dan *Ng Cheah Cheong v Ong Sing Hock* [2002] 6 MLJ 481 tidak diikut/ditolak.

(3) Pada masa ini, adalah mustahil untuk perayu mengeluarkan dan menyampaikan notis rayuan dalam tempoh 14 hari menurut statut. Walau bagaimanapun, perayu yang terkilan tidak dihalang daripada memohon lanjutan masa untuk menyampaikan notis rayuan yang diindorskan. Permohonan mudah disokong dengan alasan munasabah adalah memadai. Dalam kes ini, defendan (perayu) tidak berbuat sedemikian (lihat perenggan 19).

(4) Hakikat bahawa salinan notis rayuan yang telah diendors itu tidak dimasukkan dalam rekod rayuan bermakna dokumen itu tidak dikeluarkan dari pendaftar mahkamah. Tanpa salinan yang telah diendors dan disertakan dalam rekod mahkamah, Mahkamah Rayuan tidak boleh membandingkan dan mengesahkan sama ada notis yang tidak diendors itu adalah sama dengan salinan yang telah difailkan.

Mahkamah Rayuan oleh itu boleh menganggap bahawa perayu telah menghentikan rayuan tersebut (lihat perenggan 20).

(5) Di bawah A 1A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), mahkamah mempunyai budi bicara untuk memastikan litigasi sivil tidak dihalang oleh sebab ketidakpatuhan kaedah-kaedah menurut prosedur. Bagi tujuan menggunakan budi bicara tersebut, perlu terdapat keterangan untuk mewajarkan kaedah-kaedah ketat itu dipintasi. Dalam kes ini, penyampaian notis yang tidak diendors yang dipersoalkan tidak boleh menyelamatkan kes defendan (perayu) kerana tiada keterangan yang menunjukkan bahawa notis tersebut adalah sama dengan yang telah difailkan itu. Ketiadaan apa-apa pembetulan juga tidak membantu defendan/perayu. Untuk membenarkan rayuan yang tidak kompeten dalam kes ini mengakibatkan berlaku ketidakadilan yang cukup besar. Tambahan, jika plaintif (perayu) di sini dibenarkan bergantung kepada A 2 k 3 KMT, ia akan mengakibatkan pelanggaran kaedah-kaedah ketat dalam sistem kehakiman dan menyebabkan A 49 KMR tidak berkesan, selain daripada menjejaskan plaintif (responden) (lihat perenggan 24).

(6) Rayuan dari mahkamah bawahan tidak 'dimulakan' sehingga notis rayuan difailkan, diendors dan notis yang telah diendors itu disampaikan (lihat perenggan 25).]

Notes

For cases on appeal from Subordinate Court to High Court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 730-740.

For cases on non-compliance of rules of court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6123-6128.

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1348-1357.

Cases referred to

Lee Lan v Lim Yoon Loy & Ors [1991] 3 MLJ 419; [1991] 3 CLJ 2393, SC (folld)

Majlis Perbadanan Kangar v Sonati Development Corp Sdn Bhd [2007] 1 MLJ 133, CA (refd)

Ng Cheah Cheong v Ong Sing Hock [2002] 6 MLJ 481, HC (not folld)

Subramanya Ayyar v Swaminathan Chettiar AIR 1928 M 746 (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 2 r 3

Subordinate Courts Rules 1980 O 22 r 1, O 22 r 3, O 49, O 49 r 6(1), O 49 r 2(1), O 49 r 2(2), O 49 r 2(3), O 49 r 2(4), O 49 r 2(5), O 49 r 2(6)

Appeal from: Civil Appeal No 12–90 of 2002 (High Court, Ipoh)

Ong Gek Un (Yee Teck Fah & Co) for the appellant.
Ng Yook Woon (Ng Yook Woon Andrew TC Saw & Co) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] We had unanimously dismissed the appeal with costs, and had affirmed the decision of the learned High Court judge who had refused the defendant's appeal ('the appellant') based on a preliminary objection raised by the plaintiff, hereinafter referred to as the respondent. At the subordinate court's level the sessions court judge had allowed the respondent's application to enter a judgment under O 22 rr 1 and 3 of the Subordinate Court Rules 1980. These provisions read as follows:

> 1. Without prejudice to Order 14, rules 2, 3, 4 and 19 a party to a cause or matter may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the Cause of any other party.
> 2. ...
> 3. Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just.

[2] The brief facts of the case, as per the statement of claim, are as follows: on 8 May 1990, the respondent had entered a merchant agreement with the appellant, where the latter had agreed to purchase transactions by Mastercard holders at the respondent's establishment, which sells electrical goods. Pursuant to cl 2 of the said agreement the appellant had agreed to honour all cards when properly presented on payment for goods and services from the cardholders. In accordance with the agreement, the appellant had installed an electronic point of sale terminal at the respondent's premise, for the purpose of authorising the cards when presented. Cardholders did purchase the goods and services of the respondent with payment being made through those cards. The total number of goods and services purchased were valued at RM27,934.24. The purchases were verified and authorised by the appellant through the electronic point sale terminal.

[3] On 8 February 1995, the respondent had sent a notice to the appellant for the amount due, but was refused, resulting in him taking up an action at the sessions court to claim for the payment of the amount still owing. As stated above, the respondent on 4 April 2001 had filed an application to enter judgment against the appellant under O 22 rr 1 and 3 of the Subordinate Court Rules 1980 pursuant to an admission of the appellant that it had entered into the abovementioned merchant agreement. The sessions court judge on 14 August 2002 had allowed the respondent's application to enter judgment against the appellant. Being dissatisfied the appellant thereupon appealed to the High Court.

[4] Before the learned judge, the respondent raised a preliminary objection, in that he had not been served with a properly endorsed notice of appeal as required by O 49 of the Subordinate Courts Rules 1980 ('the SCR'). 'Endorsed' here means that the impugned notice of appeal was yet to be filed at the lower court registry, where the filing fees together with the date of receipt of the notice of appeal will be imprinted by the 'franked' receipt, thereafter to be processed by the administrative staff, and attended to by the lower court registrar. In the minimum, that notice would have been dated. At the end of the day, once the needful administrative actions have been completed, that processed document would be extracted by the appellant for onward service to the respondent or respondents. The Rules also require that a copy of the notice be sent up to the High Court registry for further action where a reference number is supplied. The steps are just a simple overview of what happens when a notice of appeal is filed before that document is extracted prior to service.

[5] What happened here was that, the appellant had served a notice of appeal on the respondent which had never been filed, processed or dated by the court, a shortcoming never denied by the appellant. In fact it was openly admitted by the latter that the need to act fast, in view of the time limit for service, required him to skip the statutory requirement.

[6] At the end of the submissions of parties before the learned judge the objection was allowed and the appeal dismissed. Before us the main grounds of appeal were that, inter alia, the learned judge had erred by failing to hold that the respondent's preliminary objection could not be sustained in view of the provisions of O 1A of the Rules of the High Court 1980 ('the RHC'), and dismissing the appellant's appeal without hearing it on its merits, let alone there was no requirement in law to have a notice endorsed by the court before its service on the respondent.

[7] Before this panel, it was a repeat performance of what happened at the High Court when the same stance was undertaken by the opposing parties,

and supplying the same authorities to buttress their respective views. To appreciate what happened during the appeal before us I herewith reproduce the relevant portion of the notes of proceedings:

Respondent: Our complaint:

— whether notice ought to be endorsed

— if not endorsed then O. 49 not complied.

— I received an unendorsed Notice of Appeal.

— That was the only Notice of Appeal.

Never received any other sealed copy. Never endorsed and time was never abridged.

Appellant 1:

1. We did not send an endorsed copy to the Plaintiff.

2. We filed Notice of Appeal in court.

— Decision: 14 August 02

— Last date: 28 August 02

— Filed in court: 16 August 02 (on time)

— served on 16 August 02.

— We took no rectification action.

— We filed Record of Appeal on 24 August 02.

— High Court dismiss on 26 March 03.

Yet: still no rectification action …

[8] The chronology of events and antecedents established that the appellant had indeed filed the notice of appeal on time but did not wait for the copies of the notice of appeal to be endorsed or returned. Instead, the appellant had merely sent a copy of an unendorsed notice of appeal to the respondent. Whether a photosated copy or a carbon copy was sent remains unclear. The notes of proceedings at the High Court, dated 26 March 2003, further revealed and confirmed that the impugned notice of appeal had no number or date on it. It was also admitted that the appellant had not made any application for an abridgement of time subsequently but had allowed the procedural flaw to subsist.

[9] To appreciate the problem before us, it will be useful if the relevant provision of O 49 of the SCR 1980 is reproduced. It reads as follows:

ORDER 49

APPEALS TO HIGH COURT

1. In this Order 'decision' includes 'judgment', 'order' and 'decree'.

2.(1) Appeals to the High Court shall be brought by giving notice of appeal in Form 140. A copy of such notice of appeal with the date filed endorsed thereon shall be sent by the Registrar to the Registrar of the High Court.

(2) An appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part, of the decision is complained of.

(3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefor a certified copy of the notes of evidence, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision.

(4) As soon as the certified copy is ready, the Court shall notify the appellant in Form 141.

(5) ...

(6) The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

[10] As one reads further the complete O 49 of the SCR, by the inclusion of the amended O 49 r 6(1) vide PU(A) 193/1993, interlocutory matters are still appealable though the procedures have been modified. Since the matter before the panel emanated from a full trial then O 49 r 2 sub-rr (1), (2), (3), (4), (5) and (6) take centre stage.

[11] The cardinal rule of construction of a statute, or for that matter rules framed under a statute, is to read them literally, that is, by giving to the words used by the Legislature their ordinary, natural and grammatical meaning, though it should not be construed so as to impute absurdity to the Legislature (*Subramanya Ayyar v Swaminathan Chettiar* AIR 1928 M 746). The test thus is to see whether the interpretation is a sound one or not. If it leads to some injustice and or absurdity then a need arises to gauge the real and true intention of the Legislature (*Interpretation of Statute* by Bindra at p 235). Obviously a harmonious construction should be given in order to avoid making one provision of the Act conflict with the other. Obviously too, in the

circumstances of the case, scrutinising O 49 r 2(6) of the SCR 1980, it cannot be read in isolation, as to do so, would render the purpose of this provision impracticable. It has to be read in conjunction with O 49 r 2(3) of the SCR.

[12] Learned counsel for the appellant had ventilated, referring to *Ng Cheah Cheong v Ong Sing Hock* [2002] 6 MLJ 481 as his authority, that nothing was stated in O 49 r 2(6) of the SCR, that the notice of appeal to be served by the appellant within the time limited for the filing of appeal must be endorsed. The learned judge in *Ng Cheah Cheong v Ong Sing Hock* had likewise failed to find the requirement, and had opined:

> This court is of the view that in the face of this express provision in r 2(6) of O 49 of the SCR 1980 which is crystal clear, so plain and unambiguous there was no requirement for an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors. If this requirement is insisted it would surely be an usurpation of the legislative function and an extension to the Parliamentary language and this court would then be encroaching into the domain of the Legislature and importing words into the rules of the court which have in fact statutory force (see s 17(4) and (5) of the Courts of Judicature Act 1964). This court is reminded that the function of this court is 'interpretation, not legislation'.

[13] Having read O 49 r 2(6) of the SCR it is obvious to all and sundry that the requirement of the court's endorsement has not been physically legislated into this sub-provision. But must this provision be read in isolation, by totally ignoring the rest of the sub-provisions of O 49 of the SCR, and in the process result in a disharmonious construction of this procedural provision?

[14] Order 49 r 2(3) of the SCR succinctly states that *the* notice of appeal shall be *filed* within 14 days from the day on which the decision was pronounced. Under r 2(6) of O 49 the same format is applied in that '*The* notice of appeal shall be served by the appellant within the time limited for the filing of appeal …'. In simple words the notice served must be the same notice filed earlier, but having gone through the administrative processes, and not just any spare or unprocessed notice to be served.

[15] Statutorily, the filing and the service thus must be carried out within that 14 days period, from the day the decision was pronounced. By sequence the filing must come first to be caught up by that service. The inevitable question as regards the 14 days period is how is the court to know that the notice has been filed and served within the allocated time frame, unless a date is shown in the notice. Harun Mahmud Hashim SCJ in *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419 at p 420; [1991] 3 CLJ 2393 at p 2396 had occasion to remark:

SCR O 49 r 2(3) provides that the notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. It follows that the notice of appeal to be served on the respondent under SCR O 49 r 2(6) must show the date on which the notice of appeal was filed in the court appealed from. This will show the respondent that SCR O 49 r 2(3) has been complied with.

(Emphasis added.)

[16] Further the Federal Court stated:

The 1991 amendment has now put the position beyond dispute. The correct procedure then is this:

(a) First file the notice of appeal in the court appealed from within 14 days from date of the decision.

(b) Next, serve a copy of the notice of appeal showing the date on which it was filed in court, on the respondent or his solicitor, also within 14 days from date of the decision.

[17] An identifiable notice ie a notice that has been filed thus is the requirement by the Legislature, and not just any notice, that shall be served.

[18] With respect to VT Singham J in *Ng Cheah Cheong v Ong Sing Hock*, who attempted to distinguish the above Federal Court's case with the one before him, failed to appreciate the presence of the requirement of the endorsement of the court in O 49. The question of importing words into the rules did not arise as they were already there. To state that a notice of appeal which has been filed in court, attracted the attention of the registrar, who thereafter processed the notice and indicate the date when the notice of appeal was filed, as not being an endorsement, is a view that is without merit.

[19] It is indisputable that with the current problems facing the court's administrative staff, it would be nigh impossible for an appellant to extract an endorsed notice of appeal within the statutory period of 14 days, let alone serve it within that same period. But that does not stop an aggrieved party from filing for an abridgment of time to serve the endorsed notice of appeal. A simple application supported by reasonably good grounds would suffice to attract the sympathy of any judge. Here the appellant did nothing.

[20] The fact that a copy of the endorsed notice of appeal was not included in the record of appeal must surely mean that that document was not extracted from the court registry. Apart from that, it was openly admitted that if not for the unendorsed notice of appeal, no filed copy was ever served on the respondent. Without an endorsed copy extracted, and included in the record of appeal, we were unable to compare and confirm whether that

unendorsed notice was similar to the filed copy. With those set of facts before us, we must assume that the appellant had abandoned the appeal as per the filed notice of appeal.

[21] At the risk of repeating, to exacerbate matters, despite serving an unidentifiable and unendorsed notice of appeal, the appellant made no attempts to file any application, be it for abridgment of time or rectification application supported by good grounds justifying that course of action. This issue of non-application of an abridgment of time also caught the attention of the learned judge Abdull Hamid Embong J (as he then was) when he remarked:

> This to me is lame, and unacceptable, more so since there is recourse for it to enlarge the time set out by a simple application to the court. To accept this excuse put forward would mean that this court would completely ignore the procedures provided by O 49 of the RHC. This court could not be too lenient in the face of such a feeble excuse.

[22] In the course of the appeal the appellant had further adverted to O 1A and O 2 r 3 of the Rules of the High Court 1980, and ventilated that the non-compliance with the abovementioned O 49 of the SCR had not caused any miscarriage of justice. Order 1A of the RHC states:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[23] Order 2 r 3 of the RHC promulgates:

> A court or a judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[24] Reading the above provisions of O 1A and O 2 r 3 of the RHC 1980 together with O 49 r 2(6) of the SCR, we are not unmindful of the fact that, to ensure compliance, Parliament had adverted to the term 'shall'. Prima facie, when a statute uses the word 'shall', it is meant to have a mandatory effect, though there may be considerations, which may dilute the effect of that word. With the promulgation of O 1A of the RHC 1980 it is our view that some discretion was passed down to the courts to ensure that a civil litigation is not prevented by mere non-compliance of procedural rules. In order to apply that discretion, there must be some evidence before us to warrant circumventing the strict rules, to allow the appellant its day in court. Clearly the service of the impugned unendorsed notice could not have

salvaged its case as there was no evidence to show that this notice was similar to the filed ones. The want of any rectification exercise did not help the appellant's predicament either. Having considered the matter in its totality we were satisfied that to allow an incompetent appeal in the circumstances of the case would occasion a substantial injustice. Further, if O 2 r 3 of the RHC were to be allowed to be adverted to by the appellant, it would result in the flouting of the strict rules in our judicial system and make O 49 of the SCR ineffectual, let alone prejudice the respondent.

[25] To sum it up, an appeal from the subordinate court is not 'brought' until the notice of appeal is filed, whence it will be endorsed and the endorsed notice is served (*Majlis Perbadanan Kangar v Sonati Development Corp Sdn Bhd* [2007] 1 MLJ 133). Based on all the above reasons we thereupon had dismissed the appeal with costs and affirmed the decision of the learned judge.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon